NO. 48261-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

THOMAS JEFFERSON KEYS III, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-01979-3

BRIEF OF RESPONDENT

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II. The State concedes the errors claimed in issues pertaining to assignments of error two, three, and four.

STATEMENT OF THE CASE

Thomas Jefferson Keys was convicted of robbery in the first degree, three counts of assault in the first degree, malicious mischief in the first degree, attempting to elude, hit and run (injury accident), and theft of a motor vehicle. CP 33-34. In this appeal, he challenges only his three convictions for assault in the first degree. In addition to the recitation of the facts provided by Mr. Keys, the State offers the following facts as to the conduct that gave rise to the charges of first degree assault.

Thomas Irving was a witness to the conduct that gave rise to the assault first degree charges. He testified that he lived at 2411 Northeast 114th Court in Vancouver. RP 202. On September 25, 2014 at around 11:30 p.m. he was asleep in his bedroom. RP 203. His bedroom faces the street. RP 203. He awoke to sirens, loud voices, and lights flashing. RP 203. He looked out the window and saw a police car blocking the street outside his house. RP 203-04. He also saw other police cars flanked behind the blocking police car off to the sides. RP 204. He saw another

car—the defendant's—facing the police cars. RP 204. The defendant's car was at the end of a dead end cul-de-sac. RP 204. The police officers were outside of their cars, commanding the defendant to turn off and get out of his car. RP 204. Mr. Keys' car was facing the police that was blocking the street in T-bone position. RP 204-205. The driver's side door of the police car was open. RP 205. At that point Mr. Keys revved his engine and took off at a high rate of speed in the direction of the blocking police car. RP 204-205. Mr. Keys' car slammed through the driver's side door of the blocking police car as the officer standing next to the car "jumped out of the way." RP 205. The female officer who jumped out of the way of Keys' speeding car began firing shots at Keys' car. RP 206. Mr. Irving recalled her firing between three and five shots. RP 206. Mr. Keys came within "inches" of hitting the female officer. RP 206.

Corporal Ryan Starbuck is a K-9 handler for the City of Vancouver Police Department. RP 210. Starbuck was working patrol on September 25th, 2014. RP 210. That evening he heard a call go out on the radio about a hit and run in the county's area. RP 210. He didn't respond to that call as he was not needed at that time. RP 211. Approximately an hour later a call came out of a robbery in progress. RP 211. It was a "toned-out" call. RP 211. A toned-out call is a call that puts out a tone alert before the dispatcher speaks, for the purpose of getting everyone's attention that it

may be a crime in progress and may involve weapons and require multiple units. RP 211. The description of the vehicle that fled the robbery matched the description of the vehicle involved in the earlier hit and run. RP 212. At some point the search for the suspect's vehicle turned into a pursuit. RP 213. Corporal Starbuck eventually ended up at the cul-de-sac at 114th Court in Vancouver along with several other officers and the suspect. RP 216-219. Corporal Starbuck was the officer whose patrol car was blocking the roadway, as well as Mr. Keys' avenue of escape. RP 220. After parking his car Corporal Starbuck got out of the car, leaving his door open, and went to the rear driver's side door to remove his K-9 partner, Ivar. RP 221. Corporal Starbuck described what happened next:

> While I'm there in the doorway -- and so I'm inside the doorway of where the rear driver's side doors open and where his kennel is in the car, getting him hooked to a lead. I turn and I see a vehicle headed right towards the front of my patrol vehicle on the driver's side. I remember just seeing a windshield. I -- I can't say why the windshield sticks out in my mind, but a windshield sticks out in my mind. And the vehicle's accelerating. At that point, this vehicle didn't appear that it was going to stop and -- The vehicle didn't stop and Ivar and I -- at that point, I grabbed a hold of his harness and ran away from the patrol vehicle to avoid being hit.

RP 222.

The defendant's car struck Corporal Starbuck's car on the panel between the driver's door and the rear driver's side passenger door. RP 223. After the defendant's car hit Corporal Starbuck's car he heard

gunshots and watched as the suspect's car passed him. RP 227. Because the defendant's car was now on the road fleeing police again, Corporal Starbuck put Ivar into Officer Haske's car and drove away in Haske's car so that he and Ivar could assist in the search for the defendant. RP 228-229.

Officer Jamie Haske was on patrol on September 25, 2014. RP 323. She heard the toned-call over the radio as well and began driving toward the area of the reported robbery. RP 324. She ultimately joined the pursuit of the defendant's car called out by Officer Schwartz. RP 325. She ended up behind Officer Starbuck's patrol car, traveling up the dead-end road on Northeast 114th Court. RP 326. Haske stopped right behind Officer Starbuck and prepared to participate in a high-risk felony stop. RP 327. Her gun was drawn and she began to walk in a westward direction. RP 328. Officer Starbuck was directly in front of her. RP. 328. Haske's patrol car was the fifth patrol car to arrive on scene. RP 326. She saw Starbuck make a swift movement to the left, ducking down and pulling his dog close to him. RP 328. She didn't have a visual on the defendant's car. RP 329. After Starbuck made his rapid movement to the left, she looked up and saw headlights coming toward her at a high rate of speed. RP 341.She ran out of the path of the oncoming car. RP 341. She ran in the direction of a fire hydrant. RP 341.As she was running out of the path of

the car she turned and fired five shots at the car. RP 341. Asked why she did that, Officer Haske testified she was in fear for her life, in fear that she would be run over, and in fear of possibly being shot. RP 341. The car didn't stop, and rounded the corner and headed southbound on Northeast 114th Court. RP 341. At its closest point, the defendant's car came within five feet of striking Officer Haske. RP 342.

Officer Timothy Lear was also working swing shift on the evening of September 25, 2014. RP 248. He was sharing a patrol car with Officer Skeeter that night, due to the department not having enough cars that night to accommodate all the scheduled officers. RP 248-49. Lear and Skeeter heard the call come out of a recent armed robbery and responded to the call. RP 249. Along with another patrol car driven by Officer Schwartz of the Vancouver Police Department they attempted to stop the defendant's car when they located it. RP 251.The defendant didn't stop and a pursuit ensued. RP 251. Officers Lear and Skeeter eventually entered the cul-de-sac where the defendant's car was seemingly blocked in, and as Officer Skeeter got out of the car Lear told her "Watch yourself." RP 252-53. Lear said this because he feared it was a dangerous situation. RP 253. Lear parked his car in such a way as to try and close off an escape route. RP 53-54. Lear got out of his car and used it as cover. RP 260. Lear didn't see much of what occurred next other than the defendant's vehicle passing

him on its way out of the cul-de-sac and Officer Haske firing her gun at the defendant's car. RP 256. Officer Lear was not in the path of the defendant's car. RP 261.

Officer Schwartz was also on the scene in the cul-de-sac. RP 272. With his gun drawn on the defendant's car he saw the defendant drive off as though with a fully-pressed throttle and also heard shots being fired at the defendant as he drove away. RP 273-74.

As noted above, Keys challenges only his convictions for assault in the first degree.

ARGUMENT

I. The trial court did not err in finding that Keys failed to establish a foundation for the admission of reputation evidence.

Keys assigns error to the trial court's decision not to admit his proposed testimony from a deputy prosecutor about Officer Miranda Skeeter's alleged poor reputation for veracity. Keys' assignment of error should be rejected, because at trial Keys failed to establish a sufficient foundation for the admission of reputation evidence.

ER 608(a) allows for the admission of reputation evidence:

> (a) Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2)

> evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise.

Addressing the standard of review first, Keys assumes the standard of review is harmless beyond a reasonable doubt, the standard of review for constitutional errors. Keys is incorrect. The standard of review of a trial court's decision regarding the sufficiency of foundation to support the admission of reputation evidence under ER 608(a) is abuse of discretion. *Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn.App. 777, 785, 6 P.3d 583 (2000); *State v. Land*, 121 Wn.2d 494, 500, 851 P.2d 678 (1993). Keys seeks to heighten the standard of review by claiming that he was denied his right to confront a witness against him, but it is well-settled that the trial court's decision under ER 608(a) is evidentiary error which is reviewed for abuse of discretion. *Id.*

The legal principles governing the admission of reputation testimony under ER 608(a) are well settled. The Supreme Court outlined the standards governing admission in *State v. Land*:

> A party seeking to admit evidence bears the burden of establishing a foundation for that evidence. To establish a valid community, the party seeking to admit the reputation evidence must show that the community is both neutral and general. *State v. Lord*, 117 Wn.2d 829, 874, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992). Some relevant factors might include the frequency of contact between members of the community, the amount of time a person is known in the community, the role a person plays in the community, and the

> number of people in the community. The decision as to whether the foundation for a valid community has been established rests within the proper discretion of the trial court. See *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 76-77, 684 P.2d 692 (1984). A trial court abuses its discretion when it acts in a manner that is manifestly unreasonable or based on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Land, 121 Wn.2d at 500.

The trial court correctly rejected Keys' proposal to admit reputation evidence. First, the deputy prosecutor was not asked enough foundational questions to establish a general and neutral community. Ms. Probstfeld indicated she had spoken to thirty people about Officer Skeeter. She identified those people as other deputy prosecutors, "other attorneys," advocates, support staff in the prosecutor's office and city attorney's office, police officers, and defense attorneys. RP 476-77. Although a work community can be a relevant community for purposes of ER 608(a) under *State v. Land*, supra, Officer Skeeter's work community is the Vancouver Police Department, not the prosecutor's office, an unknown number of unnamed defense attorneys, an unknown number of unnamed civil attorneys (which Keys did not even establish as attorneys in Clark County), or victim advocates (whose role in the criminal justice system is limited to providing advocacy to victims and not concerning themselves

with the potential impeachment disclosure list maintained by the prosecutor's office).

To the extent that Keys established a community, it was the criminal justice community. But the criminal justice community is *not* a neutral and generalized community. *State v. Callahan*, 87 Wn.App. 925, 935, 943 P.2d 676 (1997), *State v. Lord*, 117 Wn.2d 829, 874, 822 P.2d 177 (1992), *Guijosa v. Wal-Mart*, 101 Wn.App. at 786 ("*Callahan* specifically held that "[f]or purposes of reputation testimony, the criminal justice system is neither neutral nor sufficiently generalized to be classified as a community.")

Even assuming the criminal justice system could be considered a relevant community under ER 608(a), Keys failed to establish when Ms. Probstfeld allegedly spoke to these thirty people about Officer Skeeter. Ms. Probstfeld testified she has been with the prosecutor's office since 2008. RP 475. Officer Skeeter has been with the Vancouver Police since 2006. RP 285. When did these discussions between Probstfeld and these other people occur? Keys failed to establish when this opinion was formed. In *Lord*, supra, the Court noted "...the reputation at issue must not be too remote in time from the time of the trial." *Lord* at 873, citing 5A K. Tegland, Wash. Prac., *Evidence* §231, at 202-04 (3d.Ed. 1989).

Finally, Keys never established the size of this purported community. Although Probstfeld testified about speaking with thirty people, Keys never established how many people are in this community at large. Are there a thousand people in this criminal justice community? Two thousand? We cannot determine whether thirty people is a fair representation of this community without knowing, at least approximately, how many people are in it. See *Land*, supra, at 500 (a relevant factor for the trial court to consider is the number of people in the community).

The trial court did not abuse its considerable discretion in finding that Keys failed to establish a foundation for the admission of reputation evidence.

If the trial court erred in excluding this evidence, the error was harmless. "[E]videntiary error is not prejudicial unless, within reasonable probabilities, the trial's outcome would have differed had the error not occurred." *State v. McComas*, 186 Wn.App. 307, 320, 345 P.3d 36 (2015), citing *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2015). Keys posits that the jury's finding of intent to cause great bodily harm rests entirely on Officer Skeeter's testimony that Keys appeared, to her, to be laughing as he drove out of the cul-de-sac. But there was substantial additional evidence of Keys' intent.

Prior to the police pursuit Keys drove his stolen car onto Joshua Ramsey's yard at Northeast 105th Street. RP 150-52. Upon seeing a car in the yard, Mr. Ramsey went outside to see what was going on and to determine if the driver was okay. RP 153. There was loud music coming from the car. RP 153. When Mr. Ramsey came up to the side of Keys' car to see if he was alright, Keys put the car in reverse and peeled out, getting stuck in a divot in the grass. RP 153-54. Mr. Ramsey again tried to see if Keys was okay and came up to the passenger side of the car. RP 154-55. Keys had rolled down the passenger side window a few inches and Mr. Ramsey said "Are you okay?" RP 155. Mr. Ramsey saw Keys point something at him, but couldn't be 100% sure it was a gun. RP 156. Keys was still trying to peel out and Mr. Ramsey told him (Keys) that he was going to hit him (Ramsey). RP 156. Nevertheless, Keys peeled out and ran over Mr. Ramsey's foot. RP 156.

In the cul-de-sac, Keys was facing a number of police cars and police officers standing outside of their cars, all of whom he could see clearly. Knowing that he would kill or cause great bodily harm to any officers he ran over at high speed, he revved his engine and took off at high speed in the direction of several officers and patrol cars. Keys' actions, both against Mr. Ramsey and against the police officers, proved his intent beyond any doubt. "When intent is an element of the crime,

'intent to commit a crime may be inferred if the defendant's conduct and surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability." *State v. Vasquez*, 178 Wn.2d 1, 8, 309 P.3d 318 (2013), quoting *State v. Woods*, 63 Wn.App. 588, 591, 821 P.2d 1235 (1991). Officer Skeeter's testimony about Keys laughing was not critical to the overall overwhelming evidence of Keys' intent. If error occurred, it was harmless under *either* the constitutional harmless error standard (harmless beyond a reasonable doubt) or the nonconstitutional harmless error standard. The assault in the first degree convictions should be affirmed.

II. The State concedes the errors claimed in issues pertaining to assignments of error two, three, and four.

The State agrees to the removal of any reference to the assault in the second degree counts (counts 3, 5, and 9) on the Judgment and Sentence upon remand to fix the numerous scrivener's errors.

The State agrees there are numerous scrivener's errors in the judgment and sentence. The State disagrees with Keys' claim regarding the jury demand fee because Keys was not assessed a jury demand fee. A review of page six of the Judgment and Sentence shows that although the amount of the jury demand fee, had the court decided to impose it, was noted as $250 per the statute, the court did not actually impose it because

the court placed no monetary amount on the line on the left-hand column where such a fee would be memorialized (as the DNA fee and the victim assessment). CP 38. The Judgment and Sentence should be corrected to remove the numerous scrivener's errors Keys notes in his brief.

The State has no plans to ask for a cost bill in this case if it prevails in this appeal.

CONCLUSION

Keys' assault in the first degree convictions should be affirmed. Keys' case should be remanded to the trial court for correction of scrivener's errors.

DATED this12th day of October 2017.

Respectfully submitted:

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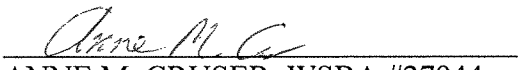
By: 

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October 12, 2016 - 11:23 AM

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